Supreme Court, U.S.
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No. 02-469

In The

Supreme Court of the United States

THE BLACK & DECKER DISABILITY PLAN,

Petitioner,

v.

KENNETH L. NORD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

This case arises under the Employee Retirement Income Security Act of 1974, as amended (ERISA) for the receipt of disability welfare plan benefits. Respondent Kenneth Nord filed the instant action on January 14, 1999, in the United States District Court for the Central District of California, seeking those benefits and a declaration of his rights to receive disability welfare plan benefits from the Black & Decker Disability Plan. The district court entered judgment in favor of the Disability Plan and against Kenneth Nord. *Petitioner's Appendix* (hereinafter *Pet. App.*) at 18-36. The Ninth Circuit reversed the district court and ordered the payment of benefits during the first 30 months of disability previously denied by the Disability Plan. *Pet. App.* at 15-16.

The Ninth Circuit reasoned that the standard of review of the ultimate decision of the Disability Plan was controlled by the decision in *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001), *cert. pending* docket no. 01-1840. *Pet. App.* at 10-11. The court of appeal concluded that evidence of rejection of the treating physician opinions coupled with procedural irregularities provided "some evidence of a conflict" of interest relevant to the standard of review. *Pet. App.* at 11. Based on the presence of a conflict of interest, the court of appeal invoked a *de novo* review of the matter as a whole and ordered the payment of benefits. *Pet. App.* at 15-16.

II

SUMMARY OF THE ARGUMENT AND REASONS FOR DENYING THE WRIT

Petitioner presents one question. The petitioner asks whether the treating physician rule found in the body of law surrounding Social Security cases decided by the circuit courts, and contained within the substantial evidence rule in every legal framework where the courts review the decisions of a professional fact finder (a non-jury), applies to disability determinations under ERISA.[1] (*Petition for Writ of Certiorari* at *i* (hereinafter *Pet.*). Petitioner argues that the Ninth Circuit's opinion conflicts with the other circuit courts of appeals, creates confusion

[1] This Court and the Circuit Courts have uniformly utilized the treating physician rule in litigation brought before the federal judiciary. *See*, *Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) (recognizing, within the context of the Americans with Disability Act (ADA), that the opinion of a responsible treating physician ought to be given the greatest of deference); and *Viteck v. Finch*, 438 F.2d 1157, 1160 (4th Cir. 1971) (utilizing the rule in cases arising under the Social Security Act); and *National Mining Assn. v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (utilizing the treating physician rule in cases arising under a claim for benefits under the Black Lung Act); and *Harris v. Railroad Retirement Bd.*, 948 F.2d 123, 126 (2nd Cir. 1991) (utilizing the treating physician rule in cases arising under the Railroad Retirement Act); and *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 273 fn. 13 (D.C. Cir. 1981) (utilizing the treating physician rule in the federal workers compensation setting); and *Curtis v. Shivers*, 674 F.Supp. 1237, 1240 (E.D. La. 1987) (utilizing the treating physician rule in cases arising under the Federal Tort Claims Act). *Cf. White v. Principi*, 243 F.3d 1378, 1380-1381 (Fed. Cir. 2001) (declining to utilize the treating physician rule in veterans' benefits cases, where Congress and the Veterans Administration specifically prescribed a statutory and regulatory framework for the consideration of evidence and where the treating physician would be employed by the fact-finding agency thereby putting the claimant at a disadvantage).

among the district courts, and creates disparate standards for determination of claims. (*Pet.* at *i* and 8-13).

As read by the petitioner, the Ninth Circuit's holding conflicts with the Second, Third, Fourth, Fifth, Seventh, and Eleventh Circuit Courts of Appeals. (*Pet.* at 15-18). The petitioner concedes that the decision of the Ninth Circuit stands consistent with the jurisprudence of the Eight Circuit. (*Pet.* at 18-20). Petitioner attempts to conflate a conflict where none exists. The Ninth Circuit's opinion is consistent with decisions from the other circuit courts of appeals regarding the treating physician rule's applicability to ERISA disability cases. Even giving petitioner's argument the most liberal of readings, any apparition that is perceived as conflict amongst the circuit courts of appeals is readily distinguished as superficial on the unique facts addressed in each cited case.

Petitioner argues that the application of the treating physician rule somehow strips the plan administrator of the flexibility written into the ERISA regulations. (*Pet.* at ___). The application of the treating physician rule in practice operates differently. The application of the treating physician rule, and the deference shown to treating physicians, merely sharpens the decision-making process by the ERISA plan fiduciary and ultimately the courts, a worthwhile goal.

Petitioner criticizes the Ninth Circuit for believing that plan administrators have an inherent tendency to cheat plan participants and for recognizing that treating physicians are due some deference as a result of the treating relationship. (*Pet.* at 10-11). Petitioner's aspersion is unwarranted. The Ninth Circuit's recognition of the

inherent credibility of a treating physician, absent evidence of actual impropriety, is consistent with this Court's acknowledgment of that concept. *See Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) (Kennedy, J., concurring in the judgment) (opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference)

Petitioner contends that a treating physician's opportunity to bill for more services creates an inherent conflict of interest or possesses a treating physician to render a biased opinion. (*Pet.* at 11-12). Petitioner's implication that a treating physician cannot offer an unbiased professional assessment of a patient's medical condition or operates a medical practice with the intent to commit fraud and issue an unsubstantiated opinion in favor of a claimant is unreasonable and an implication rejected by this court. *See Pegram v. Herdrich*, 530 U.S. 211, 218 (2000) (recognizing that the check on the incentive to provide more care then necessary is a physician's obligation to exercise reasonable medical skill and judgment in the patient's interest). Therefore, this Court itself rejects petitioner's implication that the medical profession is one whose members would risk their licenses to practice medicine by fraudulently certifying disability.

Petitioner contends the concept that treating physicians are entitled to deference imposes a draconian rule. (*Pet.* at 12). Rather than imposing an automatic, controlling, or absolute result, the treating physician rule merely articulates what is commonsense. Namely, that treating doctors have a greater opportunity to know and observe a patient and therefore their opinions should not be dismissed out of hand, but instead given deference. *See Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600

(9th Cir. 1999). The existence of other evidence supporting or detracting from the treating physician's opinions animates the analysis of whether a plan administrator is privileged to reject that opinion as a mixed question of fact and law.

Petitioner attacks the Ninth Circuit's reasoning as "limp" and self-serving. (*Pet.* at 12-13). Petitioner's denigration of the Ninth Circuit, that it merely intends to lighten the, judicial workload within that circuit, ignores the concerns of the federal courts and their limited resources. The circuit courts recognize that the motivating concern of the federal courts in ERISA disability matters is that parties resolve their dispute at the administrator's level. *See Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287, 300 (5th Cir. 1999). That concept is consistent with the goal of a statute, "the purpose of which is at least in part 'to promote the interests of employees and their beneficiaries.'" *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1141 (9th Cir. 2001) *cert. pending* docket no. 01-1840; *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). Clarity of result that an unreasonably rejected treating physician's opinion will expose an ERISA plan to benefits and the costs of litigation should act as a deterrent to the whimsical rejection of the treating physician's opinions in the first instance.

Petitioner urges that its petition be granted on the basis that the application of the treating physician rule takes away plan discretion. (*Pet.* at 13). No discretion has been lost. The discretion of an ERISA fiduciary is no different than the discretion of the Commissioner of the Social Security Administration to make any reasonable decision so long as it is supported by substantial evidence. 42 U.S.C. § 405(g). Certainly an ERISA fiduciary that

makes a decision without the support of substantial evidence acts out of an abuse of discretion.

The Ninth Circuit's decision stands congruent with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989), or this Court's most recent interpretation of *Firestone*. *See Rush Prudential HMO v. Moran*, ___ U.S. ___, 122 S.Ct. 2151, ___ fn. 15 (2002). The Ninth Circuit scrupulously applied the same analysis, as this Court did in *Firestone*, in deciding this matter, recognizing that Congress empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans. *See, Menhorn v. Firestone Tire Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984); *see also, Rush Prudential HMO, Inc. v. Moran, citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Contrary to petitioner's claim, the adoption of the treating physician rule provides for common sense uniformity in the treatment of medical opinions and is consistent with the true primary goal of ERISA, which is to protect employee benefits.

III

ARGUMENT

A

NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS

Petitioner asserts that the Ninth Circuit's decision facially conflicts with the decisions in six other circuit courts of appeals, and thus provides a basis for the court to grant its petition for a writ of certiorari with respect to the

application of the treating physician rule to ERISA disability claims. (*Pet.* at 14-22). Petitioner misstates the law. The court of appeals painstakingly set out the bases and rationale for application of the treating physician rule in the ERISA disability context. *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001) *cert. pending* docket no. 01-1840. The application of the treating physician rule in the Ninth Circuit is consistent with the decisions of the other circuit courts of appeals.

The Second Circuit Court Of Appeals

The Second Circuit Court of Appeals issued a decision on November 19, 2001, recognizing the treating physician rule in cases arising under ERISA. *See, Conners v. Connecticut Gen. Life Ins. Co.*, 272 F.3d 127 (2nd Cir. 2001). In *Conners*, the court of appeals found error in the district court's failure to recognize that the treating physician had the status of a treating physician, that if the district court had properly so recognized, it would have no doubt accorded that opinion greater weight. *Conners*, 272 F.3d at 135-136. The weight accorded a treating physician under the treating physician rule represents nothing more than a starting point for commonsense analysis of whether the plan's final decision is legally sufficient.

The court of appeals did not adopt the treating physician rule for purposes of the *de novo* standard of review. *Id.*, at 136 fn. 4. The court of appeals in *Conners* explained that the treating physician rule is designed to "encourage the development of the administrative record so that the district court can determine whether the administrator's decision was supported by substantial evidence." *Id.* Therefore, the treating physician rule serves no particular

purpose in the context of *de novo* review by the district court. *Id.* By implication, the Second Circuit applies the treating physician rule to cases before it under the abuse of discretion standard of review, and in practice remanded the matter where the district court violated the common-sense starting point of the treating physician rule under the *de novo* standard. The Second Circuit is consistent with the Ninth Circuit.

The Third Circuit Court of Appeals

The Third Circuit Court of Appeals in *Skretvedt v. E.I. Dupont De Nemours And Co.*, 268 F.3d 167 (3rd Cir. 2001) applied the treating physician rule, citing the Ninth Circuit's decision in *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001) *cert. pending* docket no. 01-1840. *Skretvedt v. E.I. Dupont*, 268 F.3d at 184. In *Skretvedt*, the court of appeals analyzed an application for disability benefits under ERISA and the abuse of discretion standard. The court of appeals summarily concluded without fanfare that:

> We have long recognized that in the analogous area of disability benefits determinations under the Social Security Act, the "opinions of a claimant's treating physician[s] are entitled to substantial and at times even controlling weight." *Fargnoli v. Massanari*, 247 F.3d 34, 43 (3d Cir. 2001); *see also Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981); *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001).

Id. Therefore, the Third Circuit agrees with the Ninth Circuit's decision in the present matter.

Petitioner did not rely on the Third Circuit decision in *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 43 (3rd Cir. 1993). In *Abnathya*, the Third Circuit did not reject the treating physician rule; it utilized it. *Abnathya* rejected the conclusory note of the treating physician in favor of the more detailed opinion of the examining physicians. *Abnathya*, 2 F.3d at 43. That is precisely how the treating physician rule is applied in practice. (*See, Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1139 (9th Cir. 2001) (explaining that the deference given to the treating opinion under the rule is not absolute and subject to rejection based on the articulation of sufficient reasons supported by substantial evidence within the record)).

Therefore, the Third Circuit in *Abnathya* applied a corollary doctrine of the treating physician rule, that conclusory opinions are not entitled to deference. The court of appeal simply applied the name to the doctrine in *Skretvedt*. The Third Circuit's decisions do not, as petitioner alleges, deepen the split among the circuit courts of appeals. (*Pet.* at 22). Rather, the Third Circuit has incrementally and iteratively adopted the treating physician rule. *See, Skretvedt*, 268 F.3d at 184; *see also Edgerton v. CNA Ins., Co.*, 215 F.Supp. 2d 541, 549 (E.D. Pa. 2002) (applying *Skretvedt* and *Regula*, holding that the rationale of the treating physician rule equally applies to the area of determining whether an individual is disabled for the purposes of an ERISA plan, where a plan administrator, like the Social Security Administration, must look at the claims file to determine whether an individual qualifies for disability benefits).

The Fourth Circuit Court Of Appeals

Petitioner relies upon the Fourth Circuit's decision in *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 608 (4th Cir. 1999), to find a conflict. (*Pet.* at 17). A fair reading of *Elliott* does not repudiate the treating physician rule. In *Elliott* the application of the treating physician rule to the facts of that case made no difference in light of the "persuasive contradictory evidence." *Id., citing Foster v. Heckler*, 780 F.2d 1125, 1130 (4th Cir. 1986) (finding that substantial contrary evidence existed to overcome any deference afforded a treating physician). The Fourth Circuit has clearly used the parameters of the treating physician rule to determine at least in the alternative that the rule's application had no basis in fact to the case presented to it. *Elliott*, 190 F.3d at 608.

Elliott ignored the prior learned dictum in *Sheppard & Enoch Pratt Hospital, Inc. v. Travelers Insurance Company*, 32 F.3d 120, 126 (4th Cir. 1994). In the context of the doctor trying to obtain plan benefits, Sheppard declined to adopt the treating physician rule. *Sheppard & Enoch Pratt Hospital*, 32 F.3d at 126. In *Sheppard* the treating physician had an obvious and material conflict, i.e., the payment of benefits directly to the doctors or medical care facility. *Id.* The court of appeals noted that the treating physician rule is appropriate when the application of that rule involves an assessment of whether the claimant is in fact disabled. *Id.* The Ninth Circuit dealt with the same issue finding that where evidence of "actual improprieties" exists, the fact finder is privileged to reject the opinions of the treating physician without further ado. *Saelee v. Chater*, 94 F.3d 520, 523 (9th Cir. 1996).

The petitioner relies on *Webster v. Black & Decker (U.S.), Inc.*, 33 Fed. Appx. 69, 75, 2002 WL 533653, *5 (4th Cir. April 10, 2002) (unpublished) for the propositions that the treating physician rule does not apply and that it can resolve conflicting medical evidence. (*Pet.* at 17, fn. 4). However, the court of appeal in *Webster* affirmed because the medical and vocational information relied upon was more detailed than the treating physician opinions. *Id.*

This is consistent with the full understanding of the treating physician rule, i.e., that the administrator can reject those opinions where contradicted by substantial evidence. The utilization of the treating physician rule in *Webster* explicitly refutes petitioner's argument that the rule strips plan administrators of adjudicatory discretion. The treating physician rule as applied in *Webster* demonstrates that the rule merely sharpens the decision-making process by a plan administrator, a worthwhile goal.

As the Ninth Circuit recognized in the present matter, the facts of *Sheppard* and the application of the treating physician rule are distinguishable when the issue is whether that rule applies in disputes over prescribed treatment, i.e., disputes over the payment of health care benefits directly to a physician rather then the receipt of disability benefits by the claimant. *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1143 (9th Cir. 2001). The Ninth Circuit and the Fourth Circuit are complimentary. At most, there is an intra-circuit tension in the Fourth Circuit about the application of the treating physician rule to ERISA disability matters, between *Sheppard's* dictum and *Elliott's* observation that the rule would not change the outcome in that case.

The Fifth Circuit Court of Appeals

The petitioner relies upon the Fifth Circuit's decisions in *Salley v. E. I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992) but not *Dowden v. Blue Cross & Blue Shield of Texas, Inc.*, 126 F.3d 641, 644 (5th Cir. 1997). (*Pet.* at 17-18). The court of appeals held that application of the treating physician rule to the distinct facts of the cases was not appropriate.

The court of appeals in both cases declined to adopt the treating physician rule in the context of the doctor trying to obtain plan benefits. *Dowden*, 126 F.3d at 644 and *Salley*, 966 F.2d at 1016. In *Dowden* and *Salley,* the facts indicate that the treating physicians had an obvious and material conflict, i.e., the payment of benefits directly to the doctors or medical care facility. *Id*. The Fifth Circuit stated that where such a conflict exists, the treating physician rule does not apply. *Salley* at 1016. The Ninth Circuit dealt with the same issue, finding that where evidence of "actual improprieties" exists, the fact finder is privileged to reject the opinions of the treating physician without further ado. *Saelee v. Chater*, 94 F.3d at 523.

But as the Ninth Circuit recognized in the present matter, the facts of *Dowden* and *Salley* and the application of the treating physician rule are distinguishable when the issue is whether that rule applies in disputes over prescribed treatment, i.e., disputes over the payment of health care benefits directly to a physician rather then the receipt of disability benefits by the claimant. No conflict exists between the Ninth and Fifth Circuits on this issue, i.e., whether the treating physician rule applies in disability cases.

The Sixth Circuit Court of Appeals

Jackson v. Metropolitan Life, 24 Fed. Appx. 290, 293, 2001 WL 1450811, *2-3 (6th Cir. Oct. 29, 2001) (unpublished), for whatever minimal weight an unpublished opinion may carry, does not stand for a different proposition. There, the court of appeal relied on *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834 (8th Cir. 2001) (*Marshall*) for the notion that the treating physician rule does not apply. *Id.* However, the court stated that applying the treating physician rule would not change the result because of the substantial evidence contradicting the treating physician opinions.

The Seventh Circuit Court of Appeals

The petitioner cites *Wilczynski v. Kemper Nat'l Ins. Co.*, 178 F.3d 933, 938 (7th Cir. 1999) to support the thought that treating physicians are not entitled to special weight. However, the court relied on the opinions of treating physicians in a conflicted record to affirm the decision of the carrier. *Id.* Resolving conflicts between treating physicians stands consistent with the treating physician rule or the grant of deference to those opinions.

The Eight Circuit Court of Appeals

The petitioner recognizes that *Donaho v. FMC Corp.*, 74 F.3d 894, 899 (8th Cir. 1996) supports the proposition that the treating physician rule applies in the disability context of ERISA matters. (*Pet.* at 19). Petitioner rests considerable weight on the Eighth Circuit's later opinion in *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834 (8th Cir. 2001) (*Marshall*). (*Pet.* at

19). The issues raised with respect to *Marshall* are two-fold.

The first is whether *Marshall* could overturn *Donaho*. It cannot. *U.S. v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001) ("it is well established, however, that one panel of this court may not overrule another and so we must decline appellant's invitation to reconsider our prior decision").

The second question is whether the Eighth Circuit in *Marshall* expanded or constricted the incorporation of Social Security concepts into the ERISA disability paradigm. Upon careful analysis, the Eighth Circuit expanded its incorporation of Social Security concepts. *Marshall*, 258 F.3d at 843 states:

> As we recently observed, however, a treating physician's opinion does "not automatically control, since the record must be evaluated as a whole." *Fletcher-Merrit* [*v. NorAm Energy Corp.*, 250 F.3d 1174, 1180 n. 3 (8th Cir.2001)] (*citing Bentley v. Shalala*, 52 F.3d 784, 786 (8th Cir.1995)).

The Eighth Circuit clearly adopted the treating physician rule in *Donaho*, 74 F.3d at 899. It is clear upon careful reading of *Marshall* that the Eighth Circuit did not retreat from the pronouncement of the treating physician rule in *Donaho*, but instead continued to import the applicable tools from the Social Security decisional paradigm by citing *Bentley v. Shalala, supra*.

The holding in *Marshall* is consistent with the treating physician rule in its full regalia as understood and applied in the circuits. *See e.g., Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998) (rejecting the isolation of a quantum of evidence approach). The proposition is patent on

the face of *Marshall* in any event; the court of appeals cited a Social Security case for the proposition that the treating physician rule is tempered by the need to review the record as a whole. *Marshall*, 258 F.3d 843, *citing Bentley v. Shalala*, 52 F.3d at 786. The Eighth Circuit has properly expanded its reliance on Social Security cases to develop the common law of ERISA.

The Eighth Circuit continues in its adoption and refinement of the treating physician rule in *Coker v. Metropolitan Life Ins. Co.*, 281 F.3d 793, 799 (8th Cir. 2002) (*citing* and *applying Donaho*, giving deference to treating physician, but finding that plan administrators properly rejected the treating opinions); *see also*, *Conley v. Pitney Bowes*, 176 F.3d 1044, 1049 (8th Cir. 1999) (applying and finding that the rule is not that a treating physician opinion trumps all other evidence, but that a court must give it appropriate weight); and *Dodson v. Woodmen of the World Life Ins. Soc.*, 109 F.3d 436, 438 (8th Cir. 1997) (same).

There exists no conflict between the Eight Circuit's decision in *Donaho* and the Ninth Circuit's decision in the present matter or *Regula v. Delta Family-Care Disability Survivorship Plan, supra*. The final informed analysis illustrates that the Eight Circuit continues to incorporate relevant concepts from the common law surrounding the Social Security Act's disability provisions into its ERISA jurisprudence.

The Eleventh Circuit Court Of Appeals

The petitioner relies upon the Eleventh Circuit's decision in *Jett v. Blue Cross and Blue Shield of Alabama*, 890 F.2d 1137, 1139 (11th Cir. 1989) (*Jett*), as evidence of

conflict. (*Pet.* at 18). As the Ninth Circuit stated in *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1143 (9th Cir. 2001) *cert. pending* docket no. 01-1840, *Jett* involved medical eligibility for payment claim. *Jett* declined to adopt the treating physician rule in the context of a doctor trying to obtain plan benefits. *Jett*, 890 F.3d at 1138. In *Jett*, the facts indicate that the treating physician had an obvious and material conflict. *Id.* [2] The Eleventh Circuit stated that where such a conflict exists, the treating physician rule does not apply. *Jett*, 890 F.3d at 1138. The Ninth Circuit has dealt with the same issue finding that, where evidence of "actual improprieties" exists in the rubric of the treating physician rule, the fact finder is privileged to reject the opinions of the treating physician without further ado. *Saelee v. Chater*, 94 F.3d at 523. *Jett* does not represent the last word on the matter.

Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321 (11th Cir. 2001) (*Levinson*) answers the question within the jurisdictional boundaries of the Eleventh Circuit where no evidence of impropriety exists. The court of appeals noted that the district court had given less weight to the opinion of a reviewing physician and more weight to the treating physician relying upon *Donaho*. *Levinson*, 245 F.3d at 1329. The court of appeals affirmed the decision of the district court including its reliance upon *Donaho* to give greater weight to the opinions of a treating physician. *Levinson*, 245 F.3d at 1332. Judge Cox in partial dissent differed only in the remedy, stating that he

[2] In *Jett*, the claimant and treating physician sought plan benefits and a determination that psychiatric hospitalization was medically necessary, where the treating physician was employed by the hospital.

would remand for further consideration by the carrier of an unaddressed issue. *Levinson*, 245 F.3d at 1332-1333 (J. Cox, concurring in part and dissenting in part). Therefore, the entire panel agreed with the weight of the evidence assigned by the district court and its reliance upon *Donaho*. The Eleventh Circuit has thus affirmed the use of the treating physician rule in ERISA *disability benefit* cases in *Levinson*, which is distinguishable from its decision in *Jett*, dealing with the issue of the treating physician rule within the context of *health care benefits*.

Petitioner ignores the opinion in *Levinson*, failing to cite or discuss it in its petition. Rather, petitioner relies on the recent Eleventh Circuit decision in *Turner v. Delta Family-Care Disability and Survivorship Plan*, 291 F.3d 1270, 1274 (11th Cir. 2002). (*Pet.* 18). The *Turner* decision is not binding precedent. *See, Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (a later panel may not overrule an earlier panel decision, following the old Fifth Circuit rule).

The Eleventh Circuit in *Levinson* issued a panel decision, distinguishable on its face from *Jett*, affirming the use of the treating physician rule within the ERISA context where the treating physician does not have an economic interest. That opinion is binding on the Eleventh Circuit. The Eleventh Circuit held in *Godfrey v. Bellsouth Telecommunications, Inc.*, 89 F.3d 755, 758-760 (11th Cir. 1996) that a plan administrator commits an abuse of discretion in ignoring the opinions of the treating physicians and relying on in-house physicians. *Id.* The court concluded that to ignore the treating physician advanced the proposition that the decision was tainted by a palpable conflict of interest. *Id.*

There exists no tension between the Eleventh Circuit's decision in *Jett* and the Ninth Circuit's decision in the present matter. At most, there is an intra-circuit tension in the Eleventh Circuit about the application of the treating physician rule to ERISA disability benefit matters, between the panel decisions in *Godfrey*, *Levinson*, and *Turner*.

Summation

The Ninth Circuit Court of Appeals' decision in the present matter stands consistent with her sister circuit courts. The opinions of the circuit courts that have decided the issue of whether the treating physician rule applies to cases arising under ERISA in determining a claimant's eligibility for *disability benefits* have found that it does. The cases decided under a claim for *health care benefits* are also consistent throughout the circuit courts, finding that where an actual impropriety exists the rule does not apply. Based on this distinction, no conflict exists among the decisions of the circuit courts of appeals. Petitioner has raised the mere apparition of a conflict that, upon close examination, is nothing more than miniscule intra-circuit tension fleshing out the body of the common law concepts.

Justice Kennedy said it best:

> The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference.

Olmstead v. L.C., 527 U.S. 581, 610 (1999) (Kennedy, J., concurring in the judgment) (under the Americans with Disability Act).

The Ninth Circuit's incorporation of the treating physician rule is applicable to disability determinations arising under ERISA, is consistent with the Congressional mandate that the federal judiciary is charged with the development of a body of federal common law governing employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 *citing* 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits) ([i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans); *see also Menhorn v. Firestone Tire Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984). The Ninth Circuit's recognition that the "treating physician rule" may be utilized within the context of actions brought under ERISA is nothing more then the recognition, consistent with that of Justice Kennedy's, that treating physicians are entitled to deference.

The court of appeals did not "borrow" the "treating physician rule." As recognized by the Ninth Circuit:

> It has long been settled among the circuit courts that disability determinations under SSA will be guided by the treating physician rule. *See Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983) (joining the Second, Fifth, and Sixth Circuits in holding that the treating physician's opinions should be accorded greater weight than that of an examining or reviewing physician). The Social Security Administration subsequently codified the treating physician rule in its regulations governing disability determinations. *See* 20 C.F.R. § 404.1527(d), 416.927(d) (2001).

Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1150 (9th Cir. 2001), *cert. pending* docket

no. 01-1840. It is the Social Security Administration that acquiesced to the concept of the treating physician rule from the common law, a rule and concept utilized by federal courts with respect to suits arising under the ADA, Black Lung Act, Railroad Benefits Act, and Federal Tort Claims Act.[3]

The Ninth Circuit's decision does not incorporate the Social Security Act into the ERISA context. The treating physician rule is not an absolute, requiring a plan to give a treating physician controlling authority; it is merely the common sense recognition, as articulated by Justice Kennedy in *Olmstead v. L.C.*, that a treating physician opinion is entitled to deference. *Olmstead v. L.C.*, 527 U.S. at 610. A treating physician is afforded deference because he has a greater opportunity to "know and observe the individual as a whole." (*Pet. App.* at 15a, *quoting Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). As the court of appeals found, such deference is warranted under a statute, "the purpose of which is at least in part 'to promote the interests of employees and their beneficiaries.'" (*Pet. App.* at 17a *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983)). Therefore, the "treating physician rule" is properly found within ERISA.

IV

CONCLUSION

There exists no conflict in this case between the Ninth Circuit's decision and the other circuit courts. The Ninth

[3] *See*, cases cited *supra* note 1.

Circuit's application of the treating physician rule is consistent with this Court's and the Circuit Court's utilization of that rule throughout the body of federal law and effectuates the purpose of ERISA. Further, the Ninth Circuit's opinion is consistent with this Court's mandate that the federal judiciary is charged with the development of a body of federal common law. For all the forgoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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